



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

Any agreement canceling the principal obligation cancels the surety's obligation. *Whitcher v. Hall*, 5 B. & C. 269. Though the principal obligation is preserved, an agreement between creditor and principal increasing the surety's potential risk releases him. *Holme v. Brunskill*, 3 Q. B. D. 495. Appeal bonds are conditional upon reversal or payment. It has been held that an affirmance by consent increases the risk by destroying the surety's chance for reversal and therefore releases him. *Johnson v. Flint*, 34 Ala. 673. But some courts argue that the surety is nevertheless bound because the principal in agreeing to affirmance acts within his authority. *Bailey v. Rosenthal*, 56 Mo. 385; *Howell v. Alma Milling Co.*, 36 Neb. 80; *Drake v. Smythe*, 44 Ia. 410; *Thomas Motor Branch Co. v. United States Fidelity & Guaranty Co.*, 153 N. Y. App. Div. 32. Moreover, the principal could have defaulted on appeal without releasing the surety. *Cf. Share v. Hunt*, 9 Serg. & R. (Pa.) 404. And an affirmance by consent has been considered equivalent in substance to default. *Ammons v. Whitehead*, 31 Miss. 99. These arguments forget that it is the creditor's conduct and not the principal's, in agreeing to the affirmance, that is to be considered, since the equitable defense of variation of risk rests upon the creditor's duty to the surety. But contrary decisions releasing the surety overlook the difference between the two conditions of the bond. The creditor owes the surety an equitable duty not to interfere with payment. *Leonard v. Village of Gibson*, 6 Ill. App. 503; *Ross v. Ferris*, 18 Hun (N. Y.) 210. But he owes no such duty as to reversal. His avowed purpose is, indeed, to prevent reversal, and securing an affirmance by any lawful means should not release the surety. *Chase v. Beraud*, 29 Cal. 138. Some courts, however, hold that an affirmance by consent is never within the contemplation of the bond. *Large v. Steer*, 121 Pa. St. 30, 15 Atl. 490. *Cf. Baker v. Frellsen*, 32 La. Ann. 822; *Foo Long v. American Surety Co.*, 146 N. Y. 251, 40 N. E. 730.

TRADE MARKS AND TRADE NAMES — EQUITABLE PROTECTION OF A TRADE NAME WHERE NO ACTUAL COMPETITION. — The plaintiffs had developed a nation-wide business in milk products, such as condensed milk, malted milk, and cream, under the trade name "Borden." A manufacturer of ice cream organized the defendant company with a nominal incorporator by the name of Borden, presumably for the sole purpose of enabling the ice cream to be sold under the name "Borden." The plaintiffs, who had hitherto sold an ice cream only for use in hospitals, brought a bill in equity to enjoin the deceptive use of the trade name, alleging that they were about to put a commercial ice cream on the market. *Held*, that no injunction should be granted. *Borden's Condensed Milk Co. v. Borden's Ice Cream Co.*, 45 Chic. Leg. N. 121 (C. C. A., Seventh Circ.). See NOTES, p. 442.

## BOOK REVIEWS.

THE DISTINCTIONS AND ANOMALIES ARISING OUT OF THE EQUITABLE DOCTRINE OF THE LEGAL ESTATE. By R. M. P. Willoughby. Cambridge, England: The University Press. 1912. pp. xx, 118.

Too much should not be expected of a doctor's dissertation, which as such may be highly creditable to its author and yet not all that might be desired as a discussion of the subject chosen. Thus, the present example is excellently written, contains many acute and valuable observations, such for instance as the suggestion that in modern judicial applications of the doctrine of tacking we may "detect a note rather of triumph than of surrender — the triumph of art, not the surrender of justice to the binding force of unfortunate precedent"

(p. 71), is closely reasoned from the author's premises, and shows a good sense of proportion in the treatment of the topics considered. These things lead us to expect much from the author in the future. But one can only regret that of the possible conceptions of equity he should have adopted and taken for his starting point the over-refined, scholastic conception that developed by way of reaction from the attempt of seventeenth-century chancellors to identify law and morals, rather than the conception which Langdell and Ames and Maitland following them have worked out so completely and justified so thoroughly both by history and by analysis.

Mr. Willoughby assumes that equitable rights may be rights *in rem*, and hence that equitable interests or estates are real interests. From this standpoint doctrines as to *bona fide* purchase for value are criticized as anomalous, since they allow these real interests to be cut off where a corresponding legal interest would not be affected. If one takes what must be regarded as the orthodox view of such interests, the anomaly disappears. But it does not seem that there is an anomaly even from the standpoint that equitable interests are real. As Maitland has pointed out, it is quite possible to say that *cestui que trust* has a right against the whole world that no one except a purchaser for value without notice shall take the trust *res* for any purpose except to carry out the trust. Indeed one need not put it in so involved a form. It is entirely allowable to say that equity regards *cestui que trust* as having a right against the whole world that no one shall take the *res* for any other purpose than to carry out the trust and yet recognize that, in order to protect the social interest in security of transactions and security of acquisitions, equity concedes to the holder of the legal title, who stands before the world as owner, a power to confer a complete title upon a purchaser for value without notice. It is usual to say that this power to convey to a purchaser for value without notice who will take free of the equity is decisive against the view that there may be equitable rights *in rem*.<sup>1</sup> A few examples may suffice to show that this is fallacious. To take one from the common law, a sale in market overt will give a title good against the (former) legal owner. That is, the seller in market overt, for protection of the social interests in security of transactions in the public markets and security of acquisitions, was conceded a power of conferring an original title by the sale. Yet no one would say that at common law the rights of owners of cattle were not rights *in rem*. Again, where land is conveyed and the conveyance is not registered, in most of our jurisdictions, although title has passed, there is a power in the owner of record, who now has no title, to confer an original title good against all unregistered interests, upon a purchaser for value without notice who records. Yet no one would say the rights of the holder of the unrecorded conveyance were *in personam* only. Nor is it necessary to accept the suggestion frequently urged by Sir Frederick Pollock, namely, that Trust is *sui generis*. One may say there are two things involved, a fiduciary relation and an equitable ownership. The relation involves a personal duty of the trustee to perform the trust *in specie* and a right *in personam* of *cestui que trust* to have it so performed. The ownership is a right *in rem* that no one shall take the *res* for any purpose other than to perform the trust, but is subject to a power in the trustee to give a title free of such right to a purchaser for value without notice. There is nothing anomalous in this. A contract in the same way creates a personal relation, a right *in rem* and a power. The obligee has a right *in personam* against the obligor. He has also a right *in rem* that no one shall interfere with the profitable relation thereby created. The obligor has a power, in ordinary contracts, by breach of his promise to put an end to his duty of performing *in specie* and substitute a duty of paying damages.

There is much more to be said, therefore, upon the question of the nature

<sup>1</sup> See Hart, The Place of Trust in Jurisprudence, 28 Law Quarterly Review, 290.

of equitable rights than the English books have said thus far. Mr. Willoughby passes over this question lightly and the value of his critique is impaired in consequence. But one point which he makes is suggestive and valuable. He shows that originally seisin involved a power to defeat legal title precisely as legal title now involves a power to defeat equitable interests, and very aptly compares conveyance by a trustee to a purchaser for value with a tortious feoffment. When the person seised stood before the world as owner, the reason for recognizing this power in him was obvious. The analogy suggests that a further development may yet take place, as all causes come to be administered by one tribunal in one proceeding, which will treat all interests in property as legal interests. But in that event it is not unlikely that some development of the power of cutting off such interests, on the common-law analogy of sale in market overt, may become necessary.

The remainder of the book is chiefly taken up with the English doctrine of tacking incumbrances or the *tabula in naufragio*, which is handled in the best analytical fashion and carried out to its logical results in a way that is interesting and suggestive. The English derive many advantages from unity of jurisdiction, and in many ways there are heavy disadvantages in the American diversity of independent jurisdictions making, as Professor Wigmore so felicitously puts it, the question, "What is the law?" one "which cannot be answered except as with fifty tongues speaking at once." But there is one great advantage with us which goes far to make up for the disadvantages. We are not constrained to find ingenious reasons for bad rules which are beyond the reach of juristic criticism. No course of decision in one court can put bounds to our juristic search for the right. Every doctrine, therefore, must undergo tests of history, analysis and fitness to its ends and to the ends of law, so long as it is open or likely to be reopened in any of our fifty jurisdictions. Hence an American author in like case would have had opportunities to do much more than was possible in England.

R. P.

VALUATION OF PUBLIC SERVICE CORPORATIONS. Legal and Economic Phases of Valuation for Rate Making and Public Purchase. By Robert H. Whitten. New York: Banks Law Publishing Company. 1912. pp. xl, 798.

Now that it has become understood that in dealing with the public services we have to do with a distinct class of economic agencies subject to common law, we may expect much progress to be made by careful studies of particular phases of the general problem which the public utilities present. It is probable that no one problem is of more importance than the one which this book treats so exhaustively. Certainly there is nothing in public-service regulation that seems more basic to-day. With us in America, wherever regulation is going on there is always on guard that provision of the Constitution which is said to forbid confiscation. Property devoted to public service, indeed, is to-day better protected than any other property subject to our police. For the decisions to-day will put a stop to regulation of public utilities which prevents the earning of a proper return upon fair value. Fair value is therefore the crux of the whole matter, and from the transitory point of view of the courts fair value means present value. But what does present value mean — does it mean the cost to reproduce new the actual plant in its present state? This is what one is often told has been so thoroughly established, that all that is left for us to do is to see that the details are properly worked out. The worth of such a book as this shows in nothing more than its refusal to take all this for granted. It goes back to the authorities, and lets each court speak for itself. And with insight into the problem it warns against laying down rigid rules.